

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN LOYAL RUNNELS,

Defendant and Appellant.

E068878

(Super.Ct.No. BAF1600817)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. (Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant John Loyal Runnels guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 1), and being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1), count 2).¹ The jury also found true the allegation that defendant was personally armed with a firearm in the commission of count 1. (Pen. Code, § 12022, subd. (c).) A trial court further found that defendant had four prior drug convictions (Health & Saf. Code, former § 11370.2, subd. (a)) and had served four prior prison terms (§ 667.5, subd. (b)).

The court sentenced defendant to three years on count 1, a consecutive four years on the Penal Code section 12022 firearm enhancement, and a concurrent term of two years on count 2. The court imposed one year each on the four prison priors but ordered them to be concurrent. The court then struck two of the prior drug convictions and sentenced defendant to three years each on the remaining two. (Health & Saf. Code, former § 11370.2.) The total sentence was 13 years in state prison.

On appeal, defendant contends that: (1) this court should review the sealed record of his *Pitchess*² motion; (2) the Health and Safety Code former section 11370.2 enhancements should be stricken pursuant to Senate Bill No. 180 (2017-2018 Reg. Sess); (3) the court should have stayed the sentence on count 2 under Penal Code section 654; (4) the imposition of various fees and costs should be stricken; (5) the court erred in imposing a restitution fine under Penal Code section 1202.4 and corresponding parole

¹ All further statutory references are to the Penal Code unless otherwise noted.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

revocation fine under Penal Code section 1202.45 in the amount of \$10,000; and (6) the matter should be remanded to the trial court for a mental health diversion hearing under Penal Code section 1001.36.

The People concede, and we agree, that we should review the sealed *Pitchess* records, that the Health and Safety Code section 11370.2 enhancements should be stricken, and that the sentence on count 2 should be stayed under Penal Code section 654. However, the People contend, and we agree, that the matter should be remanded for the court to determine the proper amounts of the various fees and costs at issue and the restitution and parole revocation fines. In all other respects, we affirm.

FACTUAL BACKGROUND

A police officer conducted a traffic stop on a vehicle that defendant was driving, after noticing some Vehicle Code violations. The officer detained defendant and asked if he could search his car. Defendant consented. The officer found a loaded .22-caliber revolver in the backseat center console, a stun gun, two digital scales, 11 clear plastic baggies that contained what appeared to be methamphetamine, and approximately 100 empty baggies. The 11 baggies each contained approximately the same weight of methamphetamine.

ANALYSIS

I. The Court Properly Concluded There Was No Discoverable

Information Under *Pitchess*

On August 4, 2016, defendant moved for discovery of the police personnel records of the officer who stopped him regarding any complaints of false arrests, false statements

in reports, false claims of probable cause, false statements of education, training or experience, false testimony, or any other complaints of dishonesty. The trial court granted the motion and conducted an in camera review of the officer's personnel records. It concluded that there were no discoverable items and ordered the records sealed.

Defendant now requests that we independently review the personnel records and determine whether the trial court abused its discretion in finding no discoverable items among the records. Because the record did not include copies of the documents produced, we ordered augmentation of the record for the purpose of creating a record from which this court could determine whether the documents reviewed by the trial court are discoverable. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1231.)

The subject records of the in camera hearing have been provided to us under seal. Our review of the materials reveal no discoverable information pertaining to issues of false arrests, false statements in reports, false claims of probable cause, false statements of education, training or experience, false testimony, or any other complaints of dishonesty. We thus conclude that the trial court's decision was not an abuse of discretion. (See *Jackson, supra*, 13 Cal.4th at p. 1221.)

II. The Enhancements Under Health and Safety Code Former Section 11370.2

Should Be Stricken, Pursuant to Senate Bill No. 180

Defendant argues that, pursuant to Senate Bill No. 180, his prior convictions for violations of Health and Safety Code section 11352 no longer qualify for enhancements under Health and Safety Code section 11370.2. Thus, the two enhancements the trial

court imposed under former section 11370.2 should be stricken. The People concede, and we agree.

The court sentenced defendant in June 2017. At that time, Health and Safety Code former section 11370.2 provided that any person convicted of a violation of Health and Safety Code section 11378 “shall receive, in addition to any other punishment authorized by law . . . a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section . . . 11352” (Health & Saf. Code, former § 11370.2, subd. (c).)

Senate Bill No. 180, effective January 1, 2018, “removes a number of prior convictions from the list of prior convictions that qualify a defendant for the imposition of an enhancement under [Health and Safety Code] section 11370.2, subdivision (c).” (*People v. Millan* (2018) 20 Cal.App.5th 450, 454 (*Millan*).) Among those convictions that no longer serve to qualify a defendant for an enhancement under Health and Safety Code section 11370.2, subdivision (c), are convictions for a violation of Health and Safety Code section 11352. (Health & Saf. Code, § 11370.2, subd. (c).) Health and Safety Code section 11370.2, subdivision (c), effective January 1, 2018, currently provides: “Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11380, whether or not the

prior conviction resulted in a term of imprisonment.” (See *Millan, supra*, 20 Cal.App.5th at pp. 454-455.)

It is undisputed that the amendment to Health and Safety Code section 11370.2, subdivision (c), lessens punishment for a person such as defendant whose prior convictions no longer qualify for the three-year enhancement. (See *Millan, supra*, 20 Cal.App.5th at p. 455.) “Rather than being subjected to a three-year enhancement for each prior conviction, such persons are no longer subject to *any* enhanced punishment pursuant to the amended statute.” (*Id.* at p. 456.) It is also undisputed that defendant’s case is pending on appeal and, is thus, not yet final. Accordingly, the trial court is directed to strike the two Health and Safety Code section 11370.2, subdivision (c) enhancements. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *Millan, supra*, 20 Cal.App.5th at p. 455.)

III. The Trial Court Should Have Stayed the Sentence on Count 2

Pursuant to Section 654

Defendant argues that the trial court erred in imposing a four-year term on the firearm enhancement (§ 12022, subd. (c)) with regard to count 1, as well as a concurrent two years on count 2 for being a felon in possession of a firearm (§ 29800, subd. (a)(1)). He contends that the court should have stayed the sentence on count 2, pursuant to section 654, since the arming enhancement and felon in possession conviction were both based on the gun found in his car. The People concede, and we agree.

Section 654 “bars multiple punishment for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.” (*People v.*

Calderon (2013) 214 Cal.App.4th 656, 661.) It can apply to enhancements. (*People v. Ahmed* (2011) 53 Cal.4th 156, 163.)

People v. Buchanan (2016) 248 Cal.App.4th 603 (*Buchanan*) involved facts nearly identical to the instant case. A jury convicted the defendant of possession of a firearm by a felon (§ 29800, subd. (a)(1)), based on a handgun found on the floor of the minivan he was driving when he was pulled over by the police. (*Buchanan*, at p. 617.) The jury also found true that he was personally armed (§ 12022, subd. (c)), based on the same possession of the handgun. (*Buchanan*, at pp. 606, 616-617.) The court held that section 654 “applie[d] to the arming enhancements that attach[ed] to the same conduct as formed the basis for [the defendant’s] conviction of being a felon in possession of a firearm.” (*Buchanan*, at p. 618.) Since the sentence on the enhancement was greater than the sentence on the felon in possession conviction, the court stayed the sentence on the felon in possession conviction. (*Id.* at p. 618.)

In light of *Buchanan*, the People concede that the trial court here erred in imposing sentences on the arming enhancement and the felon in possession conviction. Thus, the sentence on the felon in possession conviction in count 2 should be stayed pursuant to section 654. (*Buchanan, supra*, 248 Cal.App.4th at p. 618; *People v. Jones* (2012) 54 Cal.4th 350, 353 [a concurrent sentence must be stayed if it violates § 654].)

IV. The Matter Should Be Remanded for the Court to

Specify the Fees, Fines, and Penalties

Defendant argues that, because the trial court failed to state on the record the imposition of the booking fees, presentence incarceration expenses, and presentence

report cost, this court should strike such fees and costs. We disagree. Rather, we remand the matter for the trial court to specify the exact fees and amounts it meant to impose.

Before sentencing, the probation department prepared a report recommending that defendant be ordered to pay a \$514.58 booking fee (Govt. Code, § 29550), presentence incarceration costs of \$1,500 (Pen. Code, § 1203.1c), and the costs of a presentence probation report in an amount to be determined by the probation department, not to exceed \$1,095 (Pen. Code, § 1203.1b).

At the sentencing hearing, the court stated that “the usual fines and fees will be imposed.” It went on to order defendant to pay a restitution fine in the amount of \$10,000 and a parole revocation fee in the same amount. It also ordered defendant to pay a criminal conviction assessment fee of \$60 and a court operation assessment fee of \$80. The court did not specifically mention the booking fee, presentence incarceration costs or probation report costs. However, the sentencing minute order and abstract of judgment reflect that the court ordered defendant to pay a \$514.58 booking fee, presentence incarceration costs of \$1,500, and costs of a presentence probation report in an amount to be determined by the probation department, not to exceed \$1,095.

Defendant asserts that when the clerk’s transcript conflicts with the reporter’s transcript, “the question of which of the two controls is determined by consideration of the circumstances of each case.” He then claims that the lack of mention in the reporter’s transcript of the specific fees and costs pertaining to the booking fees, presentence incarceration costs, and probation report costs “precludes their imposition.” He states that it appears the clerk merely inserted the fees and costs from the probation report, that

the reporter's transcript " 'is entitled to greater credence,' " and that this court should not imply the imposition of the fees and costs. (*People v. Smith* (1983) 33 Cal.3d 596, 599 [when the record is in conflict, " 'it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence' "].)

We acknowledge that "[t]he oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment." (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) However, we also recognize that trial courts frequently orally impose penalties and surcharge "by a shorthand reference to 'penalty assessments.' " (*Ibid.*) "The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment. This is an acceptable practice." (*Ibid.*)

In any event, assuming the court's reference to "the usual fines and fees" was insufficient to support the booking fee and presentence costs listed in the minute order and abstract of judgment, the court should specify the exact fines and amounts it meant to impose on remand.

V. The Court Should Reconsider the Restitution/Parole Revocation Fines

At the time of sentencing, the court imposed a restitution fine of \$10,000, pursuant to section 1202.4 and a corresponding parole revocation fine of \$10,000, pursuant to section 1202.45. Defendant argues that the fine amount was not commensurate with the seriousness of the offense, exceeded the formula provided by section 1202.4, subdivision (b)(2), and constituted an unconstitutionally excessive fine. Thus, he argues

that the fines should be recalculated on remand. In light of the changes in defendant's sentence discussed *ante*, the People agree that the fines should be recalculated.

Section 1202.4, subdivision (b), provides that, in every case where a person is convicted of a crime, the court shall impose a restitution fine, unless it finds a compelling reason not to. For convicted felons, the fine shall be set between \$300 and \$10,000, at the court's discretion. (§ 1202.4, subd. (b)(1).) Section 1202.4, subdivision (b)(2), provides a formula that courts may use in setting the amount—\$300 multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which he is convicted.

Since we are remanding for resentencing in light of Senate Bill No. 180 and the court's failure to stay the sentence on count 2 under section 654 (see *ante*, §§ III & IV), the trial court should reconsider the amount of the restitution fine and corresponding parole revocation fine after correcting defendant's sentence. The corrected sentence will change the factors used in the section 1202.4, subdivision (b)(2) formula; therefore, the court can, at its discretion, adjust the amount accordingly. (See *People v. Le* (2006) 136 Cal.App.4th 925, 933-934 [a trial court cannot consider a felony conviction for which the sentence should have been stayed under § 654, for purposes of the § 1202.4, subd. (b)(2) calculation].)

VI. No Remand Is Necessary with Regard to a Mental Health

Diversion Eligibility Hearing

Defendant contends that the matter should be remanded for a mental health diversion hearing under the recently enacted section 1001.36, which allows for

defendants with diagnosed and qualifying mental disorders to participate in a pretrial diversion program. (§ 1001.36, added by Stats. 2018, ch. 34, § 24, eff. June 27, 2018.)

We conclude that no remand is necessary.

Effective June 27, 2018, the Legislature created a diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (§ 1001.36 A court may grant pretrial diversion if all of the following criteria are met: (1) the court is satisfied that the defendant suffers from one of the enumerated mental disorders, evidenced by a recent diagnosis by a qualified mental health expert; (2) the court is satisfied that the defendant’s mental disorder was a significant factor in the commission of the charged offense; (3) the defendant’s mental health symptoms would respond to treatment, in the opinion of a qualified mental health expert; (4) the defendant consents to diversion; (5) the defendant agrees to comply with treatment; and (6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety. (§ 1001.36, subd. (b)(1)(A)-(F).) The court may require the defendant to make a prima facie showing that he will meet the minimum requirements of eligibility for diversion. If a prima facie showing is not made, the court may summarily deny the request for diversion. (§ 1001.36, subd. (b)(3).) “ ‘[P]retial diversion’ means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment.” (§ 1001.36, subd. (c).)

Defendant contends that section 1001.36 applies retroactively, citing *Frahs*. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220 (*Frahs*) [the court found the defendant’s case was not yet final on appeal, even though his case “ha[d] technically been ‘adjudicated’ in the trial court,” and applied the pretrial diversion retroactively].) He further claims he has made a prima facie showing of the minimum eligibility requirements for diversion. In support of this assertion, he points to the probation officer’s report, which makes reference to a mental health evaluation report by the Riverside County Department of Mental Health (the County) from March 16, 2015. The report indicated that defendant had symptoms including “ ‘psychotic features, polysubstance dependence and chronic pain which has severely impaired the patient’s personal, family, social, and occupational function.’ ” Defendant also points to a statement by defense counsel in the report stating, “ ‘[t]his is a homeless mentally ill individual trying to survive.’ ”

The People argue that *Frahs* was wrongly decided and aver that section 1001.36 does not apply here, since it provides for a *pretrial* diversion, and defendant’s case has already been adjudicated. The People further contend that defendant has not demonstrated prima facie eligibility for relief.

Assuming without deciding that *Frahs* was correctly decided and Penal Code section 1001.36 applies retroactively, we agree with the People that defendant has not made a prima facie showing of eligibility. Before trial, the court ordered that defendant’s mental health be evaluated under Evidence Code section 1017, pursuant to defendant’s request. The court appointed a psychologist to evaluate him. Subsequently, the court

found that “defendant [did] *not* meet the criteria for Mental Health Court.” (Italics added.) Thus, there is no apparent “diagnosis by a qualified mental health expert” opining that he suffered from a qualifying mental health disorder, as required by Penal Code section 1001.36, subdivision (b)(1)(A). Moreover, we note that the County’s report shows defendant’s symptoms merely included “ ‘psychotic features.’ ” In contrast, in *Frahs*, there was evidence presented at trial affirmatively showing the defendant had actually been diagnosed with schizophrenia disorder. (*Frahs, supra*, 27 Cal.App.5th at p. 788.) We also note that defendant has not shown, or even alleged, that “[his] mental disorder was a significant factor in the commission of the charged offense.” (Pen. Code, § 1001.36, subd. (b)(1)(B).)

We conclude that defendant has failed to make a *prima facie* showing of eligibility for pretrial mental health diversion under section 1001.36. Therefore, remand on this ground is unnecessary.

DISPOSITION

The matter is remanded to the trial court, and the court is instructed to: (1) strike the two Health and Safety Code section 11370.2, subdivision (c) enhancements; (2) stay the sentence on count 2, pursuant to Penal Code section 654; (3) specify the booking fees and presentence costs it meant to impose; and (4) reconsider the amount of the restitution and parole revocation fines.

The clerk of the superior court is then directed to prepare an amended abstract of judgment reflecting the changes and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, we affirm.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.